In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00317-CR

GEORGE WILLIAM AIKMAN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court No. 078059-C-CR, Honorable Ana Estevez, Presiding

April 22, 2022

MEMORANDUM OPINION

Before QUINN, CJ., and PIRTLE and DOSS, JJ.

Pursuant to a plea-bargain agreement, Appellant George William Aikman, pled guilty to the offense of online solicitation of a minor,[1] but retained the right to appeal the district court's order denying his two motions to suppress. Through two issues, Appellant argues the district court erred by failing to suppress the challenged evidence, arguing that

[1] TEX. PENAL CODE ANN. § 33.021(b).

the Texas exclusionary rule[2] requires suppression of evidence obtained by police officers who themselves violate prostitution and solicitation laws. Concluding Appellant lacked standing to seek suppression of the challenged evidence under article 38.23(a), we affirm the district court's judgment.

Background

Amarillo Police Department Special Victims Unit officers placed fictitious advertisements on various websites offering prostitution services. Appellant responded to one of the advertisements through text messages with an officer masquerading as a sixteen-year-old female, agreed to engage in sexual conduct with the fictitious sixteen-year-old female at a local motel in consideration for money, was arrested at the motel, and charged with online solicitation of a minor.

Pursuant to article 38.23 of the Texas Code of Criminal Procedure, Appellant filed two motions to suppress all evidence obtained by police on the ground that "law enforcement actors made an explicit offer of sex for money." At the hearing of Appellant's motions, one of the officers who posed via text message as the fictitious sixteen-year-old female agreed on cross-examination that he participated in commission of the offense with which Appellant was charged[3] and the offense of solicitation of prostitution.[4] The

[2] TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

[3] The indictment alleged Appellant "did then and there, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicited a minor to meet with the defendant, with the intent that the minor would engage in deviate sexual intercourse or sexual intercourse with the defendant." *See* TEX. PENAL CODE ANN. § 33.021(c).

[4] *See* TEX. PENAL CODE ANN. § 43.02(a).

officer also acknowledge that he provided Appellant the opportunity to commit online solicitation of a minor.

Following the hearing, the district court denied Appellant's suppression motions. Appellant thereafter pled guilty as part of a plea-bargain agreement and was placed on four years' deferred adjudication community supervision and fined $1,000. Appellant retained the right to appeal the district court's suppression ruling. This appeal followed.

Analysis

Through two issues, which we discuss jointly, Appellant argues the district court erred by failing to suppress all evidence obtained by police because, in the course of obtaining the evidence, the officers committed the offense of prostitution[5] and participated in the online solicitation of a minor.[6] Appellant reasons the seized evidence was subject to exclusion under article 38.23(a). The State responds that Appellant lacked standing to seek suppression of the challenged evidence because police did not violate his constitutional or statutory rights.

[5] A person commits the offense of prostitution "if the person knowingly offers or agrees to receive a fee from another to engage in sexual conduct [or] if the person knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another." TEX. PENAL CODE ANN. § 43.02(a),(b).

[6] A person commits the offense of online solicitation of a minor when "the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person." TEX. PENAL CODE ANN. § 33.021(c).

A person acts as a party to the commission of an offense if he acts with intent to promote or assist the commission of the offense and "solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a). A party is criminally responsible for the offense although committed by another person. *Id*.

Standard of Review

We ordinarily review a trial court's ruling on a motion to suppress under the abuse of discretion standard. However, when, as here, the material facts are undisputed, our review is de novo. *See Oles v. State,* 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). We will sustain the trial court's suppression ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Gonzales v. State,* No. 07-15-00039-CR, 2015 Tex. App. LEXIS 12177, at *5 (Tex. App.—Amarillo Nov. 30, 2015, pet. dism'd) (mem. op., not designated for publication) (citation omitted).

Standing

We assess whether Appellant had standing to complain of the police activity he contends was unlawful under article 38.23(a). Article 38.32(a) provides, in relevant part, "No evidence obtained by an officer . . . in violation of any provisions of [Texas law], shall be admitted in evidence against the accused on the trial of any criminal case." TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

An initial reading of article 38.23 appears to be exceptionally broad, to apply to any action by the government that is violative of any law, without regard to the extent of the violation or victim of the act. However, numerous courts have held that article 38.23 challenges may be brought only by individuals who possess standing, viz., those who are *victims* of the alleged illegal act. In 1992, the Texas Court of Criminal Appeals had occasion to examine an article 38.23 challenge brought by a capital murder appellant who sought to suppress evidence of a lurid tape recording he had made for a female inmate. The tape was stolen from the female inmate by another detainee and given to jail

authorities, and was later used as evidence against the appellant. The Court held that the "sweeping language" contained in article 38.23 did not grant standing to all accused persons to complain about "the receipt of evidence which was obtained by violation of the rights of others, no matter how remote in interest from themselves." All but one judge of the en banc Court joined with the following analysis:

> Although article 38.23 might be read in such a way, we are simply unwilling, by statutory interpretation, to work such a fundamental change in this State's elemental law of standing without a rather more explicit indication of legislative intent.
>
> The justiciable injury suffered as a direct and immediate result of the illegality of which Appellant here complains was not his own. The illegality, if any, was theft or conversion. The victim, if any, was [the recipient of the tape recording. She] may have a cognizable cause of action for conversion against someone. The State of Texas may have a basis to prosecute someone for the criminal offense committed against [her]. But no one may sue, nor may the State of Texas prosecute, anyone for an injury to the Appellant arising from the illegality about which he now complains, since he suffered no injury actionable under our law as a result of it. No actionable wrong was visited upon Appellant as a result of the seizure. For this reason we hold that he is also without standing to challenge such illegality in the context of a criminal prosecution, and we reaffirm our early cases to such effect.

Fuller v. State, 829 S.W.2d 191, 202 (Tex. Crim. App. 1992), *abrogated on other grounds by Riley v. State,* 889 S.W.2d 290, 301 (Tex. Crim. App. 1994) (op. on reh'g). *See also Chavez v. State*, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000) (holding that *Fuller* controls the disposition of appeal, and that police sergeant's drug sting operation conducted in county outside boundaries of interlocal assistance agreement did not require exclusion of evidence under article 38.23: "Appellant lacks standing to complain about the seizure of the cocaine because [the officer] did not obtain the cocaine in violation of appellant's rights."). Article 38.23(a) is purposed "to protect a suspect's privacy, property, and liberty rights against overzealous law enforcement," and functions primarily "to deter unlawful

actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution." *Wilson v. State,* 311 S.W.3d 452, 458-59 (Tex. Crim. App. 2010). *See also Miles v. State,* 241 S.W.3d 28, 36 n.33 (Tex. Crim. App. 2007) ("Only those acts which violate a person's privacy rights or property interests are subject to the state or federal exclusionary rule.").

In other words, a defendant lacks standing to complain about evidence seized in violation of Texas law unless the defendant can show his rights were invaded by the seizure. *See Chavez,* 9 S.W.3d at 819; *Fuller v. State,* 829 S.W.2d at 201-02. We find the case of *State v. Tyson* to be illustrative as it relates to sting operations conducted by law enforcement officials. 919 S.W.2d 900 (Tex. App.—Eastland 1996, pet. ref'd). After obtaining parental permission, the Texas Alcoholic Beverage Commission equipped "a young-looking, seventeen-year-old girl" with a body microphone and directed her to enter more than 100 stores in the Abilene area in an attempt to buy alcohol as a minor. Tyson contended the evidence of his sale to the minor should be suppressed because TABC officers violated state law in knowingly assisting the minor in buying alcohol.[7] The Eastland Court of Appeals upheld Tyson's conviction. Agreeing with the Court of Criminal Appeals' analysis in *Fuller*, the court held that Tyson did not have standing "to suppress the evidence under Article 38.32 because none of his rights were violated in the transaction." *Tyson,* 919 S.W.2d at 903.

[7] At the time, the Texas Alcoholic Beverage Code did not provide an exception for a minor purchasing or possessing an alcoholic beverage under the supervision of law enforcement enforcing provisions of the code. *See* Act of May 26, 1997, 75th Leg., R.S. ch. 1139, §§ 1, 2, 1997 TEX. GEN. LAWS 4304-05 (current version at TEX. ALCO. BEV. CODE ANN. §§ 106.02(a), 106.05(b)(3)).

Similar conclusions have been reached when assessing alleged illegal acts performed by law enforcement officers when conducting prostitution sting operations. *Watson v. State,* 10 S.W.3d 782, 784-85 (Tex. App.—Austin 2000, no pet.) (concluding defendant lacked standing to complain under article 38.23 of a police officer posing as a prostitute because allegedly illegal offer by officer did not violate the defendant's constitutional or statutory rights); *Palumbo v. State,* No. 01-13-01072-CR, 2015 Tex. App. LEXIS 3831, at *9 (Tex. App.—Houston [1st Dist.] Apr. 16, 2015, pet. ref'd) (mem. op, not designated for publication) (reaching the same conclusion when police officer posed as the alleged "john" seeking sexual services).

On appeal, Appellant relies principally on *Wilson v. State*, 311 S.W.3d 452 (Tex. Crim. App. 2010), a case in which a detective to a murder investigation knew there were no legible fingerprints on the magazine of the gun found near the victim, but nevertheless manufactured a lab report in an effort to induce the defendant to admit he was the shooter. On direct appeal, the San Antonio Court of Appeals concluded the detective violated Texas Penal Code section 37.09, which prohibits one from making, presenting, or using a record "with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding." *Wilson v. State*, 277 S.W.3d 446, 447 (Tex. App.—San Antonio 2008)*, aff'd,* 311 S.W.3d 452 (Tex. Crim. App. 2010). Because the detective's fabrication was found to have caused the defendant to believe the report to be genuine and confess to the crime, the Court of Appeals found the State did not meet its burden of showing that the nexus between the confession and the fabricated report was broken. 277 S.W.3d at 450. By a 5-4 vote, the judges of the Court of Criminal Appeals affirmed, noting that the underlying purpose of article 38.23 is "to protect a

suspect's privacy, property, and liberty rights against overzealous law enforcement." *Wilson*, 311 S.W.3d at 458-59.

Unlike *Wilson*, Appellant's rights were not violated when responding to the police generated advertisement for prostitution and soliciting sex with someone he believed to be a minor. What Appellant seeks to suppress is not evidence of a crime "but *is* the very act of crime itself." *Martinez v. State,* 91 S.W.3d 331, 340 (Tex. Crim. App. 2002) (quoting 8 JOHN WIGMORE, EVIDENCE § 2282 (McNaughton rev. 1961) (emphasis in original)). We conclude Appellant lacks standing to complain of alleged unlawful police conduct under article 38.23(a). Accordingly, we overrule his two issues.

Conclusion

Based on the foregoing, we affirm the district court's order denying suppression of the challenged evidence.

Lawrence M. Doss
Justice

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